Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM H. MORRIS, NATIONAL DIETARY RESEARCH, INC. and THRIFTY DRUG CENTERS, INC.,

Petitioners,

v.

GROUP W, INC. and JERRY WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS E. SPENCER
Attorney for Petitioners
19235 U.S. Highway 41 North
Lutz, Florida 33549
(813) 949-6251

163485

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

57pp

QUESTIONS PRESENTED FOR REVIEW

I

Whether Petitioners were denied due process of law secured by the Fifth and Fourteenth Amendments to the United States Constitution when the District Court, after entry of judgment, used California Code of Civil Procedure section 187 to order Petitioners added as parties as alter egos of the judgment debtor and then summarily entered judgment against them, without first requiring compliance with the procedural due process safeguards of the Federal Rules of Civil Procedure and Federal Rules of Evidence?

II

Whether Petitioners were denied the right of jury trial secured by the Seventh Amendment to the United States Constitution when Petitioners were first given notice of Respondents' intention to seek alter ego liability after liability was determined and when the District Court imposed such liability after entry of judgment?

LIST OF PARTIES TO PROCEEDING

The following persons and corporations were parties to the proceeding in the court whose judgment is sought to be reviewed:

1. William H. Morris Company, through its division Omicron International, a Florida corporation, plaintiff and counterdefendant.

2. William H. Morris, counterdefendant.

3. National Dietary Research, Inc., a Florida corporation, counterdefendant.

4. Thrifty Drug Centers, Inc., a Florida corporation, counterdefendant.

5. Group W, Inc., a Missouri corporation, defendant and counterplaintiff.

6. Jerry Wilson, defendant and counterplaintiff.

CORPORATE DISCLOSURE STATEMENTS

1. There are no parent or publicly held companies owning 10% or more of the corporate stock of Petitioner National Dietary Research, Inc.

2. There are no parent or publicly held companies owning 10% or more of the corporate stock of Petitioner Thrifty Drug Centers, Inc.

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JURISDICTIONAL STATEMENT

Judgment was entered by the United States Court of Appeals for the Ninth Circuit on August 17, 2000. The Supreme Court of the United States has jurisdiction to review this judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

***Constitutional Provisions*:**

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***Statutes*:**

15 U.S.C. § 1125:

False designations of origin, false descriptions, and dilution forbidden.

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity.

Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(b) Importation.

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

(c) Remedies for dilution of famous marks.

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In

determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to —

(A) the degree of inherent or acquired distinctiveness of the mark;

(B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;

(C) the duration and extent of advertising and publicity of the mark;

(D) the geographical extent of the trading area in which the mark is used;

(E) the channels of trade for the goods or services with which the mark is used;

(F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;

(G) the nature and extent of use of the same or similar marks by third parties; and

(H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(2) In an action brought under this subsection, the owner of the famous mark shall be entitled only to injunctive relief unless the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity.

(3) The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution of the distinctiveness of a mark, label, or form of advertisement.

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.

***Rules of Civil Procedure*:**

Federal Rule of Civil Procedure 69(a):

In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

California Code of Civil Procedure Section 187:

Jurisdiction; means to carry into effect; mode of proceeding.

When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer; all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

California Code of Civil Procedure Section 989:

989. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Section 410.70, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

990. The summons specified in Section 989 shall be issued by the clerk, or by the judge if there be no clerk, upon presentation of the affidavit specified in Section 991, and must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable no later than ninety (90) days after the time specified for the return of the original summons. It is not necessary to file a new complaint.

991. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

992. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may

have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, by reason of any defense existing at the commencement of the action.

993. If the defendant, in his answer, denies the judgment, or sets up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he denies his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations, subject to the right of the parties to amend their pleadings as in other cases.

994. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

CONCISE STATEMENT OF THE CASE

A. Concise History of Proceedings

This case was originally filed on November 5, 1991 asserting violations of the Lanham Act, 15 U.S.C. § 1125. A counterclaim was filed and in due course the case resolved by the United States District Court for the Central District of California sitting without a jury. Appeals were taken to

United States Court of Appeals, Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part, and remanded for further proceedings. *See William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255 (9th Cir. 1995); *William H. Morris Co. v. Group W, Inc.*, 67 F.3d 310 (9th Cir. 1995).

Upon remand, and subsequent entry of judgment in favor of Respondents moved[1] to add Petitioners as parties. The District Court granted the motion and then proceeded to amend the judgment to impose liability upon Petitioners. In moving to add Petitioners as parties, and to enter judgment forthwith, Respondents' asserted Petitioners were the "alter ego" of William H. Morris Company through its division Omicron International, a Florida corporation.

An appeal was taken to the United States Court of Appeals, Ninth Circuit. The Ninth Circuit affirmed in an unpublished opinion. *William H. Morris Co. v. Group W, Inc.*, __ F.3d __ (9th Cir. 2000).

Presently before this Court are Petitioners William H. Morris (individually), National Dietary Research, Inc. and Thrifty Drug Centers, Inc. William H. Morris Company through its division Omicron International, Inc. is not a party to this petition.

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1. Respondents filed a similar motion after entry of the first judgment that was reversed on appeal. That motion was made after liability was established and only damages remained to be determined.

B. Statement of the Case

As a result of abbreviated proceedings, Petitioners are now personally liability for intentional wrongdoing. The motion that obtained this result, among other things, was based solely upon affidavits and exhibits of counsel for Respondents and a witness, Ms. Gale Waller, who was a complete stranger to the litigation[2]. The affidavit of Ms. Waller addressed matters of alleged anecdotal alter ego activity subsequent to the determination of liability in the case.

Petitioners were not served with a complaint. They were not provided an opportunity to answer and assert affirmative defenses to such a complaint. They were not allowed to assert their rights of jury trial as part of this process. They were not afforded discovery regarding Respondents' claims of "alter ego," and they were not permitted confrontation or cross-examination of witnesses who gave evidence on this "alter ego" claim.

This petition involves a complaint and counterclaim under the Lanham Act, viz., 15 U.S.C. § 1125. Jurisdiction of the original action was based upon 28 U.S.C. § 1331.

On November 4, 1991 William H. Morris Company (through its division Omicron International, a Florida corporation) complained against Group W, Inc., a Missouri corporation and Jerry Wilson. Group W, Inc. and Jerry Wilson then counterclaimed.

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2. Ms. Waller, who was introduced solely by affidavit, appears to be a resident of Missouri. Her relationship to the Respondents or Respondents' counsel, if any, is unknown with certainty, nor is it known with certainty how Ms. Waller was introduced to this California based litigation. It is believed, however, Ms. Waller is related to the Respondent Wilson.

On November 9-10, 1993 the case was tried by the United States District Court for the Central District of California, the Honorable A. Wallace Tashima presiding.[3] The case was submitted on November 19, 1993 and a judgment entered on December 1, 1993. The District Court found in favor of and against all parties, with the offsetting verdicts resulting in a net judgment for $58,343.90 for Group W, Inc. and Jerry Wilson.

After trial counsel for William H. Morris Company informed counsel for Respondents that Omicron had no assets to satisfy Group W's judgment.

All parties appealed to the Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded on September 27, 1995. *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255 (9th Cir., 1995), 67 F.3d 310 (9th Cir. 1995). In a separate Memorandum Opinion, the Ninth Circuit also affirmed in part and reversed in part. In remanding, Court of Appeals instructed the District Court to enter findings whether Omicron had intended to mislead customers. If so, the District Court was to then presume these customers were, in fact, misled. In that instance, the burden would shift to Omicron to demonstrate otherwise.

After remand, on March 4, 1996 Respondents moved to add Petitioners as defendants. The motion was denied on the grounds the remand was limited to determining damages. Afterwards, the case was partially re-trial on August 13,

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3. The Honorable A. Wallace Tashima originally presided as a United States District Judge, and upon a later remand from the Ninth Circuit, as a Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

1996. On September 9, 1996 the District Court entered a verdict for Group W, Inc. and Jerry Wilson and a net judgment in the amount of $206,640.90.

This judgment was followed by a suggestion of bankruptcy by William H. Morris Company on December 6, 1996.

On April 21, 1997 Respondents again moved to amend the judgment of September 9, 1996, supported by affidavits of counsel for Respondent, Ms. Julie G. Duffy, and Gale Waller, a witness from Missouri.

Acting upon this motion, on September 17, 1998, the District Court amended its Amended Judgment and Order of September 9, 1996 and added Petitioners William H. Morris, National Dietary Research, Inc. and Thrifty Drug Centers, Inc. as parties. At the same time, the District Court imposed upon them the judgment entered for Respondents Group W, Inc. and Jerry Wilson.

An appeal by Petitioners to the United States Court of Appeals, Ninth Circuit was decided on August 17, 2000. The Court of Appeals for the Ninth Circuit, in an unpublished Memorandum Opinion, affirmed. In affirming, the Ninth Circuit declined to follow *Nelson v. Adams USA, Inc.*, __ U.S. __, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000), choosing instead to distinguish it:

> The Supreme Court's recent decision in *Nelson v Adams USA, Inc.*, 120 S. Ct. 1579 (2000), is materially distinguishable because, in that case, there was no finding that the party added to the judgment was an alter-ego of the party already

named in the judgment. *See id.* at 1586-87 ("Adams, for its part, has disavowed reliance on a veil-piercing theory. . . . The legitimacy of [the judgment debtor] as a corporation, in short, is not at issue in this case.")

REASONS FOR GRANTING THE WRIT

I. Petitioners were denied due process of law secured by the Fifth and Fourteenth Amendments to the United States Constitution when the United States District Court for the Central District of California, used California Code of Civil Procedure Section 187 via Federal Rule of Civil Procedure 69(a) after entry of judgment to order Petitioners added as a parties to the case and through summary proceedings entered judgment against them, without first requiring compliance with the procedural due process safeguards of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

A. How California Determines Alter Ego Claims

The Federal Rules of Civil Procedure, Rule 69(a) permits the District Courts to utilize local law in proceedings supplementary to judgment:

> . . . proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought . . .

On December 12, 1998 two methods existed in California to assert a claim of "alter ego" against non-parties

subsequent to entry of a judgment. This first method is clearly consistent with due process under the Fifth and Fourteenth Amendments to the United States Constitution. That method was not used in this case. The second method, which is vastly different than the former, employs California Code of Civil Procedure section 187 and is challenged here as a procedure that denies due process of law.

In *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal. App. 4th 1828, 35 Cal. Rptr. 2d 348 (1995) Brenelli filed a separate lawsuit against the individual shareholders of Bakara Furniture, Inc. In this separate lawsuit Brenelli asserted the right to enforce a previously rendered judgment against Bakara Furniture, Inc. against its shareholders. Brenelli asserted two causes of action. First, Brenelli claimed the shareholders of the company had engaged in fraudulent conduct of to deprive Brenelli of means to collect the judgment. Next, and before dismissal of the Complaint, Brenelli was denied leave to assert a claim the shareholders were also the "alter ego" of the corporation and therefore personally liable on the prior judgment.

Unlike what happened here, *Brenelli* involved a separate lawsuit and not a motion addressed in a summary fashion. The litigants in *Brenelli* were afforded all the benefits of the fundamental rights of due process, i.e., (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) opportunity to present reasons why the proposed action should not be taken, (4) the right to present evidence, including the right to call witnesses, (5) the right to know opposing evidence, (6) the right to cross-examine adverse witnesses, (7) decision based exclusively on the evidence presented, (8) right to counsel, (9) requirement that the tribunal prepare a record of the evidence presented,

(10) requirement that the tribunal prepare written findings of fact and reasons for its decision. *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). *See also, for example, Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

With respect to the "alter ego" cause of action advanced by Brenelli, the California Court of Appeals reversed and specifically held Brenelli could maintain a separate action on this claim:

> Section 989 states: "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Section 410.70, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons." Section 410.70 provides: "In an action against two or more persons who are jointly, jointly and severally, or severally liable on a contract, the court in which the action is pending has jurisdiction to proceed against such of the defendants as are served as if they were the only defendants."
>
> These statutory provisions "only appl[y] where the alleged joint debtor was joined as a party and a cause of action was stated against him. ***"

Despite the fact a party may bring an action alleging alter ego liability in a joint debtor proceeding under section 989 *** decisional authority supports the finding proceedings under this section are permissive and not mandatory. ***

"Where appropriate a party may bring a separate proceeding to amend the judgment to name the true judgment debtor. *** Alternatively, a party may bring a wholly separate action against an individual shareholder on an alter ego theory to enforce a prior judgment against the corporation." [Citing *Taylor v. Newton*, 117 Cal. App. 2d 752, 257 P. 2d 68 (1953)] ***

[Next referring to the case in hand . . .]

The first suit established contractual liability. The second suit must establish the factual basis to justify piercing the corporate veil. Although both suits will involve some of the same factual matters and concern the same contractual obligation, their purpose and outcome are not the same. ***

"We conclude an action to establish alter ego liability is not limited to a joint debtor proceeding. Accordingly, we hold the trial court erred in sustaining respondents' demurrer without leave to amend to the count for alter ego liability on the basis this theory had to be pursued in a joint debtor proceeding." *Brenelli*, pp. 1839-1842

In the present case, Petitioners Morris, National Dietary Research and Thrifty Drug Centers were denied many of these fundamental due process benefits. Instead of following *Brenelli*, the United States District Court opted to rely exclusively upon California Code of Civil Procedure section 187 under the authority of Federal Rule of Civil Procedure 69(a). Section 187, on its face, provides no assurances of due process and permits a court to improvise:

> Jurisdiction; means to carry into effect; mode of proceeding.
>
> When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer; all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, *if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.*

(Emphasis supplied.)

Instead of applying the due process protections of California Code of Civil Procedure section 989, the District Court elected to employ California Code of Civil Procedure section 187 in a manner inconsistent with section 989. The District Court's actions are inconsistent with early California jurisprudence in which separate actions to assert alter ego claims. *See, e.g., Minton v. Cavaney*, 15 Cal. Rptr. 641, 364 P.2d 473 (1961). On the other hand, it does appear the District Court's conduct is consistent with recent rulings in California in which courts have resorted to summary proceedings to

decide alter ego claims. *See, e.g., NEC Electronics, Inc. v. Hurt*, 256 Cal. Rptr. 441, 208 Cal. App. 3d 774 (Cal. App. 6th Dist. 1989), *Dow Jones Co., Inc. v. Avenel*, 198 Cal. Rptr. 457, 151 Cal. App. 3d 144 (Cal. App. 1st Dist. 1984) and *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.*, 49 Cal. Rptr. 2d 286, 41 Cal. App. 4th 1551 (Cal. App. 1st Dist. 1996).

However, this issue of due process was raised and squarely addressed in *Dow Jones Company, Inc. v. Avenel*, 151 Cal. App. 3d 144, 198 Cal. Rptr. 457 (1984). Unlike here, an actual evidentiary hearing was conducted in *Dow Jones*. And, in upholding this procedure as complying with due process and California Code of Civil Procedure section 187 in this context, the Court of Appeals also stated:

> It is true that a motion for summary judgment is an improper vehicle for resolving disputed issues of fact. *** Thus, the trial court here could not have determined the issue of appellants' alter ego liability at the hearing on the motion for summary judgment, even if appellants had been named as defendants.

Dow Jones at p. 148.

The proceedings in this case involved neither a motion for summary judgment, nor an evidentiary hearing. Further, the decision in *Dow Jones* was a split decision, as the dissent argued this abbreviated pleading/evidentiary procedure not only violated due process, but also denied to the Avenel the right of jury trial.

A cursory review of the jurisprudence suggests California appears to have a strong propensity, in contrast with other jurisdictions, to utilize such summary procedures to impose liability upon non-parties subsequent to initial judgment. See, for example, *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974) and *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969).

Thus, without a complaint alleging facts supporting a theory of "alter ego", an opportunity to fairly place in issue such allegations through a responsive answer, an opportunity to plead affirmative defenses, an opportunity to discover evidence against Petitioners, an opportunity to assert a right to trial by jury, an opportunity to confront and cross examine witnesses, Petitioners rights of due process were abrogated in favor of a summary motion proceeding[4] in which the key evidence consisted of testimony of opposing counsel (dotted in material respects with hearsay evidence) and the hearsay affidavit of one Gale Waller, resident of Missouri. From these materials, and opposing affidavits issued by necessity by Petitioners, the District Court made findings of fact.[5]

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4. However, this proceeding was not a motion proceeding under Rule 56 of the Federal Rules of Civil Procedure. Instead, the motion proceedings were taken under Rules 60 and 69. Later, an amended notice of hearing invoked Rules 15, 20 and 21.

5. The District Court's findings including drawing inferences *against* Petitioners . . . a process ordinarily unacceptable in summary proceedings under the Federal Rules of Civil Procedure.

This procedure swept aside the law of limited liability afforded to shareholders, officers and directors of corporations in favor of full, personal liability for intentional wrongdoing that would otherwise be non-dischargeable in bankruptcy.

B. The Law of Preclusion Pertinent To Underlying Liability in Alter Ego Claims

The District Court assumed, implicitly, in its decision to enter a second amend judgment that the principals of preclusion should bar Petitioners from litigating the underlying judgment because William Morris personally participated in the case as a witness and corporate officer, and directed the defense. This decision, however, ignores the fundamental principals of preclusion, namely, that preclusion does not apply when the motivation to litigate the merits of the case may substantially differ depending upon who controls the litigation and why litigation decisions are actually made.

The general rule as stated in *Restatement of the Law, 2d*, Judgments 2d, section 59, provides:

> Except as stated in this Section, a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation, nor does a judgment in an action involving a party who is an officer, director, stockholder, or member of a non-stock corporation have preclusive effects on the corporation itself.

Two exceptions noted in the Restatement are pertinent to these proceedings:

> (3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation, unless his interests and those of the corporation are so different that he should have opportunity to relitigate the issue; and
>
> (b) The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the holder of its ownership if he actively participated in the action on behalf of the corporation, unless his interests and those of the corporation are so different that he should have opportunity to relitigate the issue; and
>
> (c) The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation.
>
> * * *
>
> (5) A judgment against a corporation that is found to be the alter ego of a stockholder or member of the corporation establishes personal liability of the latter only if he given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment.

Pertinent here is Comment g. to the Restatement. Addressing the issue of "Corporation as stockholder's alter ego," particularly the circumstances that trigger the potential liability under an "alter ego" theory, it states:

> *** If at the outset of the litigation the opposing party has manifested an intention to bind individually the persons associated with the corporation, and effects service of process addressed to those persons individually, adequate opportunity is afforded them to defend against asserted liability. On the other hand, if the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of the litigation and occasion to conduct it with a diligence corresponding to the *risk of personal liability that was involved.*

(Emphasis added.)

At the outset of this litigation only the liability of The William H. Morris Company through its division Omicron International was in issue. As a corporation, that liability was limited to its assets notwithstanding whether that liability was dischargeable or not dischargeable in bankruptcy. The availability of such economic immunity directly impacts litigation motivations, such as to what extent a matter should or need be contested, including appealed when assets exist to pay the judgment or liability limits are at acceptable levels, and how much money should be invested in a given lawsuit to contest liability versus using those funds to pay the judgment.

Respondents waited until years later to seek imposition of liability upon Petitioners, well after liability was determined and only issues of damages were at issue. Respondents, according to their attorney, sought to impose liability upon Petitioners only after they became aware that William H. Morris Company no longer had sufficient assets to pay a judgment.

Suffice to say, relevant law warranted full due process proceedings and not a summary proceeding in which the issues were not fairly framed, litigated and resolved after a full and fair hearing.

Petitioners ask the Court issue a writ of certiorari to review whether California Code of Civil Procedure Section 187, as was applied herein by the District Court, violates procedural due process of law secured by the Fifth and Fourteenth Amendments to the United States Constitution as safeguarded by the Federal Rules of Civil Procedure and Federal Rules of Evidence.

II. Petitioners were denied the right of jury trial secured by the Seventh Amendment to the United States Constitution when Petitioners were first given notice of Respondents' intention to seek alter ego liability after liability was determined and when the District Court imposed such liability after entry of judgment.

Without doubt, Petitioners would have had the right to a jury trial had they been named as parties to the case from the outset. The delay in seeking to impose alter ego liability was not the product of any mistake of identity. Instead, it came in consequence to receiving notice a suggestion of bankruptcy of William H. Morris Company.

The tactical decisions of the Respondents are solely responsible for the deprivation of this constitutional right. This tactical decision is quite significant to the relative rights of the parties, as the liability that was imposed was for "intentional" wrongdoing. As such, this liability would have had limited impact upon a corporation of limited resources. In contrast, an individual saddled with such liability has non-dischargeable liability for the full judgment as such liability is not dischargeable in bankruptcy.

The issue of whether a jury trial attaches to alter ego proceedings under California Code of Civil Procedure section 187 was addressed in *Dow Jones, supra*. There, a 2-1 majority held it did not. The dissent argued it did:

> Moreover, I read Code of Civil Procedure section 187 as a mere affirmation of the general principle that courts may do what is necessary to implementing judgments rendered where jurisdiction obtains. Certainly, I think, it cannot be read as investing a court with jurisdiction it never possessed, or permitting, in the supposed interests of judicial economy or convenience, amendment of a judgment to embrace persons over whom jurisdiction never existed, thus to deprive them of property without benefit of jury or, in fact, any trial, merely because probably judgment would have been entered against them personally had they ever gone to trial.
>
> Principally for this reason, but also because I do not believe the subject procedure comports with the dictates of due process, I would reverse the judgment.

Dow Jones at 152.

In contrast, the majority in *Dow Jones* treated this issue as one relevant to the question trial by jury of an alter ego claim. In that respect it held alter ego claims are equitable in nature and within the province of the Court, not a jury. *Dow Jones*, at 459-460.

For reasons directly pertinent to issue I. A. above, Petitioners contend their right to jury trial was denied with respect to the underlying liability imposed upon them, and that a jury determination was ultimately denied by "summary" findings of disputed matters by the District Court on the motion to amend the judgment to impose alter ego liability.

CONCLUSION

The summary proceedings employed by the District Court did not comport with the Federal Rules of Civil Procedure or the Federal Rules of Evidence. These summary proceedings, and the procedures employed by the District Court employing California Code of Civil Procedure, denied Petitioners due process of law secured by the Fifth and Fourteenth Amendments to the United States Constitution.

The imposition of judgment upon Petitioners denied them their right to jury trial secured by the Seventh Amendment to the United States Constitution. Petitioners were not notified by Respondents of their intention to imposed liability upon them until after liability had been determined in the underlying action. Petitioners had a substantially different motivation to litigate the underlying claims than the original corporate counter-defendant because Petitioners would have faced personal liability that is non-dischargeable in bankruptcy. These substantially different motivations affect a variety of litigation decisions, including whether to assert the right to trial by jury.

Petitioners request the Court grant its petition for a writ of certiorari to the Ninth Circuit of the United States Court of Appeals.

Respectfully submitted,

THOMAS E. SPENCER
Attorney for Petitioners
19235 U.S. Highway 41 North
Lutz, Florida 33549
(813) 949-6251

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED AUGUST 17, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-55246
D.C. No. CV-91-05991-AWT-GHK

WILLIAM H. MORRIS COMPANY, through its division Omicron International, a Florida corporation,

Plaintiff,

v.

GROUP W, INC., a Missouri corporation; Jerry Wilson,

Defendants.

GROUP W, INC., a Missouri corporation; Jerry Wilson,

Counterclaimants-Appellees,

v.

WILLIAM H. MORRIS COMPANY, through its division Omicron International, a Florida corporation; William H. Morris; National Dietary Research, Inc.; Thrifty Drug Centers, Inc.,

Counterdefendants-Appellants.

Appendix A

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, Circuit Judge, Presiding[2]

Argued and Submitted August 8, 2000
Pasadena, California

Before KOZINSKI, GRABER, and FISHER, Circuit Judges.

Under Federal Rule of Civil Procedure 69(a), the district court was authorized to amend the judgment in accordance with California Code of Civil Procedure § 187. *See Cigna Property & Cas. Ins. Co. v. Polaris Pictures, Corp.*, 159 F.3d 412, 421 (9th Cir. 1998); *Levander v. Prober (In re Levander)*, 180 F.3d 1114, 1120-21 (9th Cir. 1999).

The district court did not clearly err in finding that (1) William Morris, (2) National Dietary Research, Inc. (and/or National Dietary Research dba Health Care Direct), and (3) Thrifty Drug Centers, Inc. (dba Berkeley-Brown Laboratories and/or Berkeley-Brown Laboratories, Inc.) were alter egos of Morris' other corporation, The William H. Morris Company. *See Commodity Futures Trading Comm'n*

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2. The Honorable A. Wallace Tashima, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 2000) (stating the standard of review). In addition, the district court did not abuse its discretion in concluding that Counterclaimants acted with diligence and that the motion to amend the judgment was brought within a reasonable period of time. *See Cigna Property*, 159 F.3d at 421 (stating the standard of review). Indeed, in the district court, the William H. Morris Company asserted that the stay associated with the bankruptcy of one of its divisions *required* Counterclaimants to delay filing their motion.

The Supreme Court's recent decision in *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579 (2000), is materially distinguishable because, in that case, there was no finding that the party added to the judgment was an alter-ego of the party already named in the judgment. *See id.* at 1586-87 ("Adams, for its part, has disavowed reliance on a veil-piercing theory . . . . The legitimacy of [the judgment debtor] as a corporation, in short, is not at issue in this case.").

AFFIRMED.

APPENDIX B — SECOND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED DECEMBER 4, 1998, FILED DECEMBER 10, 1998 AND ENTERED DECEMBER 11, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-5991 AWT

THE WILLIAM H. MORRIS COMPANY, through its division OMICRON INTERNATIONAL, a Florida corporation,

Plaintiff,

v.

GROUP W, INC., a Missouri corporation, and JERRY WILSON,

Defendants.

GROUP W, INC., a Missouri corporation, and JERRY WILSON,

Counterclaimants,

v.

THE WILLIAM H. MORRIS COMPANY, through its division OMICRON INTERNATIONAL, a Florida corporation, WILLIAM H. MORRIS; NATIONAL

Appendix B

DIETARY RESEARCH, INC., and/or NATIONAL DIETARY RESEARCH dba HEALTH CARE DIRECT; THRIFTY DRUG CENTERS, INC., dba BERKELEY-BROWN LABORATORIES, and/or BERKELEY-BROWN LABORATORIES, INC.,

Counterdefendants.

SECOND AMENDED JUDGMENT

This Second Amended Judgment supersedes the Judgment entered in this case on December 3, 1993, and the Amended Judgment, entered on September 11, 1996, and is made to reflect the court's ruling on counterclaimants' motion to add judgment debtors to the judgment.

IT IS ADJUDGED:

1. Defendants and counterclaimants, Group W, Inc., and Jerry Wilson, shall recover plaintiff and counterdefendant, The William H. Morris Company, and counterdefendants William H. Morris, National Dietary Research, Inc., and/or National Dietary Research dba Health Care Direct, Thrifty Drug Centers, Inc., dba Berkeley-Brown Laboratories, and/or Berkeley-Brown Laboratories, Inc., jointly and severally, net damages on their counterclaim, after offset of the award to plaintiff and counterdefendant on its complaint (which award, in the sum of $93,359.10, was undisturbed on appeal), in the sum of $206,640.90.

2. Each party shall bear its or his own attorney's fees and costs. Local Rule 16.2.3 & 16.2.6.

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3. In accordance with 28 U.S.C. § 1961(a), this Second Amended Judgment shall bear interest at the rate of 5.67 percent per annum, commencing on the date of entry of the Amended Judgment, September 11, 1996. No prejudgment interest is awarded.

Dated: DEC 04 1998

s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by Designation

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ON MOTION TO AMEND JUDGMENT DATED DECEMBER 4, 1998 AND FILED DECEMBER 10, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-5991 AWT

THE WILLIAM H. MORRIS COMPANY through its division OMICRON INTERNATIONAL, a Florida corporation,

Plaintiffs,

v.

GROUP W, INC., a Missouri Corporation, and JERRY WILSON,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ON MOTION TO AMEND JUDGMENT

I. *Overview*

Group W has moved to amend the judgment it won against the William H. Morris Company dba Omicron International (Omicron) to add as judgment debtors:

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(1) William Morris (Morris); (2) his wife Marilyn Morris; (3) National Dietary Research, Inc. (NDR), and/or National Dietary Research dba Health Care Direct; and (4) Thrifty Drug Centers, Inc. (Thrifty), dba Berkeley-Brown Laboratories, and/or Berkeley-Brown Laboratories, Inc. (collectively, the Proposed Debtors).

II. *Facts and Procedural Background*[1]

Morris is the president, director,[2] and sole stockholder of Omicron, a Florida corporation, which is engaged in the distribution of dietary supplement products, primarily the product FS-1. Initially, Omicron's address was 2804 Smitter Road in Tampa, Florida, but its most recent address was shown as being the Morris' home address at 2906 Smitter Road.

In 1993, the court found Omicron liable on Group W's counterclaim, under the Lanham Act, for a letter Morris had written and sent to Group W's customers. During the trial, Morris was consistently present and was one of two primary witnesses for Omicron. Omicron appealed the decision on March 1, 1994.

While the appeal was pending, on June 28, 1994, Morris and his wife Marilyn allegedly lent Omicron $75,000 and

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1. To the extent that the declaration of Group W's attorney Julie Duffy and the accompanying exhibits are relied upon, any objections to the admissibility of such evidence are overruled.

2. Morris testified at his deposition that his wife may also be a director of Omicron.

secured the loan with all the assets of Omicron. On January 2, 1995, Mr. and Mrs. Morris and Omicron entered into a purchase and sale agreement whereby Omicron transferred all its assets, valued by Morris at $67,500, to them for $10.[3]

Morris claims that Omicron had defaulted on the $75,000 loan and that the transaction conveying the assets was in lieu of foreclosure of the security interest. Morris asserts that the value of the assets transferred was less than the balance due on the loan. At best, however, the transaction is highly suspect. First, of course, is the suspect timing of the transaction — the giving of a security interest in all of Omicron's assets to the Morrises shortly after an adverse judgment is rendered against Omicron, and then foreclosing on the security agreement within a few months, while an appeal is pending. Moreover, there is no accounting for or third-party documentation (*e.g.*, a cancelled check or bank statement) of the $75,000 Morris loaned Omicron. In short, this transaction does not have the earmarks of an arms length transaction entered into for legitimate business purposes.

At the retrial on the issue of damages, Morris was the only witness for Omicron. In April, 1996, during the retrial, Group W moved to amend its counterclaim to add the Proposed Debtors to the judgment. The court denied the motion without prejudice because the scope of the proceedings on remand was limited to determining the damages. In September, 1996, the court entered a net

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3. Both the UCC-1 and UCC-3 filed for these transactions show both Morris' and Omicron's addresses to be the same — 2906 Smitter Road.

judgment of $206,640.90, plus post-judgment interest, in favor of Group W. In November 1996 Omicron filed for bankruptcy.

Omicron claims it has no assets to satisfy the judgment against it, although as recently as 1992, its sales exceeded $4 million, and its gross profits were over $800,000. Its bankruptcy schedules state its assets to be $258.17. Group W claims that Morris intentionally led Omicron into bankruptcy by funneling its assets to himself and his wife, as well as to his other corporations in order to avoid Group W's judgment against Omicron. However, Morris states that Omicron went bankrupt due to FTC restrictions on marketing FS-1, which caused a dramatic drop in sales and also resulted in legal expenses.

In April, 1997, Group W again moved for an order amending the judgment to add the Proposed Debtors. However, after Omicron's counsel threatened to seek sanctions against Group W for violating the automatic bankruptcy stay, Group W withdrew its motion. Once Group W learned that Omicron's bankruptcy was closed, it filed the current motion.

NDR was incorporated in Florida in 1983. NDR filed an independent Annual Report in 1998. Morris, and perhaps his wife, are the shareholders, officers, and directors of NDR. NDR has a laboratory at Omicron's former address. NDR's most recent business address is listed on its 1992-1995 tax returns as being Morris' home address. At the time of Morris' deposition, NDR had a business address in Washington, D.C., at a mail receiving firm, and phone calls to NDR were fielded

by a Bethesda, Maryland, answering service. Morris asserts that NDR performs research on nutritional formulas and collects royalties from Omicron for food supplement sales, including FS-1. The reason Morris gave for Omicron's royalty payments to NDR for FS-1 was that NDR had developed the product. Morris testified that it was actually he who developed the product.

On February 28, 1995, NDR began to do business as Health Care Direct. Health Care Direct shares the same address as NDR and Omicron. In his declaration, Morris asserts that he had no connection with "National Dietary Research dba Health Care Direct." However, Secretary of State records list NDR as the owner of Health Care Direct. The exact appellation of the Health Care Direct entity is unclear.

Thrifty Drug Centers, Inc. (Thrifty), was incorporated in 1976. Its officers are Morris and his wife Marilyn. The corporation filed an annual report in 1998. Thrifty's address is also Morris' home address. Thrifty's stated purpose is to serve as a consulting business to the dietary food supplement industry. According to Omicron's 1992-1995 tax returns, NDR, Thrifty, and Omicron are "component members of a controlled group of corporations" within the meaning of section 1561 of the IRS Code.

Thrifty has been doing business as Berkeley-Brown Laboratories (Berkeley-Brown) since at least November 1993. The Dun & Bradstreet report on Berkeley-Brown stated that it was "related through common principals, management and/or ownership" to Omicron and NDR. Berkeley-Brown

shares the same address as Omicron, NDR's laboratory and Health Care Direct. It is unclear whether Berkeley-Brown is incorporated and what its official name is.

The corporations and the related entities sought to be added as judgment debtors are all involved in the sale of FS-1 in some capacity or another. Gail Waller, a nonparty, placed an order for FS-1 with Phillips Gulf Health Care (Phillips). In response to her order, Waller received a package from Health Care Direct, which bore the same address as Omicron. The package contained a bottle of FS-1 and an invoice from Berkeley-Brown, a dba of Thrifty, indicating that a bottle of FS-1 was enclosed. Also enclosed were a credit card receipt identifying NDR as the seller and a voided credit card receipt identifying Phillips as the seller.

III. *Discussion*

A. Diligence

The argument that Group W's motion to amend the judgment should be denied for failure to exercise due diligence is rejected. Group W tried to amend the judgment at the 1996 retrial, but the court dismissed the motion without prejudice as premature. Two months after the judgment was entered, Omicron filed for bankruptcy. When Group W attempted to move to amend the judgment while the bankruptcy was pending, Omicron threatened sanctions for violating the automatic stay. Now that the bankruptcy proceedings are closed, Group W has brought the motion again. These facts do not indicate a lack of diligence on Group W's part.

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B. Successor-in-Interest Liability

Group W argues that Morris and his wife are the successors-in-interest to the judgment against Omicron because they bought all of Omicron's assets, including its inventory, for inadequate consideration, thereby effectively bankrupting Omicron and making it judgment-proof. The Federal Rules provide: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). The rule applies to post-judgment motions to add parties. *See Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 566 F.2d 8, 23 (7th Cir. 1977).

A successor corporation does not inherit its predecessor's liability, unless "(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." *Beatrice Co. v. State Bd. of Equalization*, 25 Cal. Rptr. 2d 438, 445 (Cal. 1993) (citation omitted). Group W has not adduced sufficient evidence on which to predicate successor liability of Morris or his wife; therefore, "successor liability" is denied.

C. Independent Tort

Group W argues that Morris should be found personally liable for the tort underlying the judgment against Omicron.

However, any such claim should have been litigated years ago in the original action. It is an inappropriate basis for amending the judgment to add debtors. The motion to add Morris as a debtor on this ground is denied.

D. Alter Ego

Group W asserts that Morris is the alter ego of Omicron, and that the four corporations owned by Morris are also alter egos of Omicron and Morris.[4]

Under California law, the court has the authority to amend a judgment to add additional judgment debtors pursuant to the alter ego doctrine. *See* Cal. Code Civ. Proc. § 187[5]; *Dow Jones Co. v. Avenel*, 198 Cal. Rptr. 457, 460 (Ct. App. 1984). Two requirements must be satisfied in order to add debtors to a judgment under this doctrine: (1) the new party must be the alter ego of the old party; and (2) to satisfy due process concerns, the new party must have controlled the litigation, thereby having had the opportunity to litigate. *See Triplett v. Farmers Ins. Exch.*, 29 Cal. Rptr. 2d 741, 743 (Ct. App. 1994).

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4. Group W does not contend that Marilyn Morris should be added as a post-judgment debtor based on alter ego liability. It argues only that Marilyn Morris was a successor-in-interest, because she acquired Omicron's assets along with Morris.

5. Federal law looks to state law in matters of judgment enforcement: "The procedure on execution, in proceedings supplementary to and in aid of a judgment . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . ." Fed. R. Civ. P. 69(a).

Appendix C

1. *Alter Ego of the Old Debtor*

To disregard the corporate entity, the two requirements are "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." *Farenbaugh v. Belmont Constr., Inc.*, 240 Cal. Rptr. 78, 82-83 (Ct. App. 1987) (quoting *Automotriz De Golfo De California v. Resnick*, 306 P.2d 1, 3 (Cal. 1957)).

a. Unity of Interest and Ownership

Some of the factors for determining whether there is such a unity of ownership and interest that the identities of the corporation and the individual overlap include:

> the identical equitable ownership in the two entities . . .; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all the stock in a corporation by one individual or the members of a family. . . . ; the use of the same office or business location; the employment of the same employees and/or attorney . . . ; the total absence of corporate assets, and undercapitalization . . . ; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation . . . ; the disregard of legal formalities

> and the failure to maintain arm's length relationships among related entities . . . ; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another . . . .

Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 813-15 (Ct. App. 1962) (citations omitted).

i. Morris as the Alter Ego of Omicron

Morris is the sole shareholder of Omicron. He and perhaps his wife are its only directors and officers. Omicron's most recent address was listed as Morris' home address. Morris loaned money to Omicron, only to then transfer all of its assets to himself and his wife when Omicron did not pay the loan. Morris has claimed that the bankrupt Omicron is no longer selling FS-1. However, his other corporations are now involved in the sale of FS-1. Morris has manipulated the corporate form to avoid the judgment against Omicron while continuing the business of selling FS-1. He is the alter ego of Omicron.

ii. NDR and Health Care Direct

According to Morris, he created the product FS-1 in his capacity as an officer of NDR. NDR then transferred its right to the product to Omicron, which paid royalties to NDR on its sales of FS-1. However, there is no meaningful distinction

between Omicron and NDR. Both corporations appear to be mere instrumentalities for the business of Morris. Like Omicron, NDR's shareholders, officers, and directors consist of Morris and possibly his wife. NDR has no employees in Washington or elsewhere. NDR's business address was previously a mail drop in Washington, D.C., and an answering service handles all telephone calls. However, the business address listed on NDR's tax returns from 1992 to 1995 is the Morris' home address.

Morris testified in his deposition that NDR's laboratory's address in Tampa is the same as Omicron's address was at the time. The fact that NDR has kept up the appearance of a separate corporation through certain formalities is not sufficient to prove that NDR was in fact a distinct corporation with interests separate from Omicron and Morris. Contrary to Morris' assertions, NDR also appears to be involved in the sale of FS-1: when Waller received the FS-1 she ordered from Phillips, the credit card receipt identified NDR as the seller. NDR was thus used as one more conduit for Morris' dietary supplement sales. NDR is the alter ego of Omicron and will be added as a judgment debtor on that basis.

NDR began doing business as "Health Care Direct" on February 28, 1995. As an extension of NDR, this entity has no distinct individual existence. When Waller ordered FS-1, it arrived in a package bearing the name "Health Care Direct" as the return addressee. Secretary of State records list Health Care Direct as having the same address as Omicron. Health Care Direct is an alter ego of Omicron, and thus should also be added as a judgment debtor.

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iii. Thrifty and Berkeley-Brown

Thrifty has existed since 1983. Its initial officers were Morris and Marilyn Morris. Thrifty's most recent address is Morris' home address. Thrifty, NDR, and Omicron are listed as "component members of a controlled group of corporations" on tax returns filed in 1992 through 1995.

Thrifty has been doing business as "Berkeley-Brown Laboratories" since at least 1993. Morris is the director and CEO of Berkeley-Brown, which shares the same address as Omicron and NDR's laboratory. Further, there is evidence that Berkeley-Brown, like NDR and Health Care Direct, is involved in the sale of FS-1. Along with the bottle of FS-1 Waller ordered, she received an invoice recording the sale from Berkeley-Brown. This evidence shows that Berkeley-Brown, a dba of Thrifty, is merely one more name for the same business Morris carried on through Omicron. Thus, Thrifty and Berkeley-Brown also should be added as a judgment debtors.

b. Inequitable Result if Veil not Pierced

If Morris and his corporations are not held liable, Group W will not be able to collect its judgment because Omicron was put into bankruptcy by Morris. Since Morris wrote the letter that violated the Lanham Act and caused Group W's losses, it is manifestly fair that he and the corporations that he uses to carry on his business of selling FS-1 be held liable for his tort.

Appendix C

2. *Control of the Litigation*

Morris controlled this litigation. As the director and president of Omicron, Morris made all the substantive corporate decisions for Omicron and was responsible for Omicron's defense of the claims against it. Morris was one of two primary witnesses at the first trial, and was the only witness at the retrial. Given the one-man nature of the corporation and the fact that Morris himself was personally responsible for the Lanham Act violations, it is only logical — and equitable — to conclude that Morris worked closely with Omicron's lawyers and orchestrated the legal defense. *See Alexander v. Abbey of the Chimes*, 163 Cal. Rptr. 377, 380-81 (Ct. App. 1980).

For all of the foregoing reasons, the Proposed Debtors (except Marilyn Morris) are found to be alter egos of Omicron.

IV. *Conclusion*

The evidence establishes, and the court finds, that Morris has employed a web of corporate and other entities, including the plaintiff corporation and the Proposed Debtor entities, to conduct his food supplement (FS-1) sales business. These entities appear to operate interchangeably, not at arms length, and wholly at the whim of Morris; they have no separate existence apart from him. In these circumstances, it would be unjust to permit Morris, by his shell game, to deprive counterclaimants of the ability to enforce their judgment against *him*.

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Therefore, Morris and the one-man corporations that he solely owns and controls should be added as a Judgment Debtors to the judgment against Omicron.

IT IS ORDERED:

1. The motion to add Marilyn Morris as a judgment debtor is **DENIED**.

2. The motion to add (1) William Morris, (2) National Dietary Research, Inc., and/or "National Dietary Research dba Health Care Direct," and (3) Thrifty Drug Centers, Inc., dba Berkeley-Brown Laboratories, and/or "Berkeley-Brown Laboratories, Inc.," as judgment debtors is **GRANTED**.

3. A "Second Amended Judgment," consistent herewith shall be entered.

Dated: DEC 04 1998

s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by Designation